

ARKANSAS SUPREME COURT

No. CR 08-994

RUFFUS GRAY
a/k/a RUFUS GRAY
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered February 26, 2009

PRO SE MOTION FOR
RECONSIDERATION OF PRO SE
MOTION FOR BELATED APPEAL
AND MOTION FOR APPOINTMENT
OF COUNSEL [CIRCUIT COURT OF
CLARK COUNTY, CR 2004-217, HON.
JOHN A. THOMAS, JUDGE]

MOTION FOR RECONSIDERATION
DENIED; MOTION FOR
APPOINTMENT OF COUNSEL MOOT.

PER CURIAM

On February 1, 2008, petitioner Ruffus Gray, who is also known as Rufus Gray, was found guilty by a jury of attempted rape and sentenced to 560 months' imprisonment. A fine of \$7,500 was also imposed. Judgment was entered-of-record on February 27, 2008. No appeal was taken, and petitioner sought leave to proceed with a belated appeal pursuant to Rule 2(e) of the Rules of Appellate Procedure--Criminal. In the motion he contended that his retained attorney Louis Loyd knew of his desire to appeal from the judgment and wrongfully abandoned the appeal.

It is the practice of this court when a pro se motion for belated appeal is filed and the record does not contain an order relieving trial counsel to request an affidavit from the trial attorney in response to the allegations in the motion. There was no order relieving Mr. Loyd in the partial record submitted by petitioner and filed with the motion for belated appeal in this case. This affidavit is required because Rule 16(a) of the Rules of Appellate Procedure--Criminal provides in pertinent part that trial counsel, whether retained or court appointed, shall continue to represent a

convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause.

In his affidavit Mr. Loyd averred that he received a letter from petitioner shortly after he was convicted asking that Loyd withdraw as his attorney. Loyd stated that he met with petitioner, advised him that he would agree to withdraw and explained the need for a timely notice of appeal to be filed if petitioner desired to appeal. Loyd then filed a motion to be relieved as counsel, which was granted by the court in an order entered February 20, 2008. A certified copy of the order was appended to Mr. Loyd's affidavit. The judgment of conviction was entered-of-record on February 27, 2008.

We denied the motion for belated appeal because counsel was duly relieved by the trial court before the judgment of conviction was entered. Because counsel was allowed to withdraw as petitioner's attorney, he was not responsible for perfecting the appeal. Once counsel was relieved, the burden was on petitioner, if he was incapable of proceeding pro se on appeal and desired representation by counsel, to retain other counsel. If he had become indigent since retaining Loyd, it was his responsibility to file in the trial court a motion for appointment of counsel with his affidavit of indigency appended. We found that petitioner had failed to establish that there was good cause for his failure to perfect the appeal. A belated appeal will not be allowed absent a showing by the petitioner of good cause for the failure to comply with proper procedure. *See Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (per curiam).

Now before us is petitioner's pro se motion asking that we reconsider his motion for belated appeal and a motion for appointment of counsel to represent him on appeal. Petitioner contends that the trial court did not have jurisdiction to enter its order at 3:45 p.m. on February 20, 2008, relieving

counsel because petitioner had filed a pro se notice of appeal from the judgment at 9:05 a.m. on that same day. He has appended to the motion for reconsideration a letter from him to “whom it may concern” asking for “an appeal and new trial at public expense” and for appointment of counsel. The letter did not conform to Arkansas Rule of Appellate Procedure–Criminal 2(4) or 2(c)(2), which sets out the requirements for a sufficient notice of appeal in a criminal case, in that it failed to identify the judgment being appealed and failed to state whether the appeal was to this court or the Arkansas Court of Appeals. Moreover, even if a valid notice of appeal had been filed on February 20, 2008, it was filed before the judgment was entered on February 27, 2008, and thus was considered pursuant to Rule of Appellant Procedure–Criminal 2(b)(1) to be effective the day *after* the judgment was entered. Accordingly, the court had jurisdiction to relieve counsel on February 20, 2008.

Petitioner argues further that his letter to the court was a formal request for appointment of counsel and a request to proceed *in forma pauperis* on appeal. As noted, however, the letter did not meet the requirements for a notice of appeal and petitioner does not assert that he filed any other motion with the court seeking to proceed *in forma pauperis* and asking that counsel be appointed. Under these circumstances, we do not find that petitioner has stated in this motion for reconsideration any good cause to permit him to pursue a belated appeal from the judgment. As there is no good cause stated to permit an appeal, the motion for appointment of counsel to represent petitioner on appeal is moot.

Motion for reconsideration denied; motion for appointment of counsel moot.